IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-681

WILLIAM ROBERT NOLTE, Petitioner,

v.

THE BUDD COMPANY, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Merritt W. Green, II
GREEN, LACKEY & NUSBAUM
330 Spitzer Building
Toledo, Ohio 43604

Attorneys for Petitioner
William Robert Nolte
2600 Book Building
Detroit, Michigan 48226
(313) 963-4200

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

—•—

No.

—•—

WILLIAM ROBERT NOLTE, Petitioner,

v.

THE BUDD COMPANY, Respondent.

—•—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—•—

William Robert Nolte, respectfully petitions this Court to issue a writ of certiorari in order to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Order of the Appeals Court on the Defendant's Motion to Dismiss the Appeal (App. A, infra, pp. A1-A2) is not yet officially reported). The decision of the Court of Appeals denying Plaintiff's Petition for Rehearing En Banc (App. B, infra, p. A3) is not yet officially reported.

JURISDICTION

In the present case the Plaintiff's cause of action for age discrimination arising out of his termination from the employ of the Defendant was dismissed, Final Judgment being entered on January 5th, 1978. The Defendant's Motion to Dismiss the Appeal for failure to file a timely notice of appeal was granted by the Court of Appeals for the 6th Circuit on June 7th, 1978. The Plaintiff thereupon filed for a Rehearing En Banc. The Court denied this motion by its order which was entered on July 25, 1978.

Jurisdiction in this matter is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether the Federal Rules of Appellate Procedure deprive a Federal Circuit Court of Jurisdiction to hear an appeal in cases where a party has filed a notice of appeal with the Court of Appeals, and an appeal bond with the District Court, prior to the end of the 30 day period?

RULES CONSTRUED

The Court is asked to construe the following provisions in the Federal Rules of Appellate Procedure.

Rule 3(a)

> (a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 USC § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

Rule 3(c)

> (c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

STATEMENT OF THE CASE

The petitioner began employment with the respondent as a patent agent in 1964. He served competently for a period of slightly more than ten years, and was terminated from the employ of the Defendant-Appellant in 1974.

It is the petitioner's position that his termination was part of a policy of age discrimination which was directed at older workers by the respondent. He filed suit under the Age Discrimination in Employment Act (29 U.S.C. § 621 et. seq.). The Defendant filed a Motion for Summary Judgment which was granted on January 16, 1976 by the District Court.

The decision of the District Court was vacated by the Court of Appeals for the Sixth Circuit. The case was remanded to the District Court for further discovery. The petitioner undertook considerable discovery. The Motion for Summary Judgment was then reheard and the District Court Judge held that the discovery which had taken place failed to uncover evidence sufficient to change his mind about the inadequacy of the petitioner's claim. He reinstated his previous order granting summary judgment to the respondent. The petitioner brought a Motion for reconsideration. This was denied. The Court's order was entered on January 5th, 1978.

The petitioner proceeded to take an appeal from the judgment of the District Court. Being within the 30 day time period allowed for filing a notice of claim of appeal under Rule 4(a) of the Federal Rules of Appellate Procedure, the Plaintiff mailed a notice of appeal to the Court of Appeals, and filed same with the District

Court. The notice of appeal which was filed with the District Court was not docketed and the Court has no record of receiving it. The notice which has been sent to the Court of Appeals was sent to the District Court, but was not docketed by it until after the thirty day time period had run.

The petitioner also filed an appeal bond with the District Court within the time prescribed by Rule 4(a). However, the clerk of the Court returned this document to the petitioner as the District Court had no record of a notice of appeal having been filed.

A document entitled notice of appeal was docketed on February 8th, 1978, after the 30 day time period had elapsed.

The respondent filed a motion to dismiss the appeal on the ground that the Appellate Court was deprived of jurisdiction by failure to file a timely notice of appeal. The petitioner responded to this motion arguing in part that the filing of the appeal bond which contained the essential information required under Rule 3(c) satisfied the jurisdictional requirements that the Court had the power to hear the appeal and that within the context of the case it would be unjust to dismiss the appeal. The petitioner cited caselaw which held that an Appellate Court could consider an appeal bond to be a valid notice of appeal when the appeal bond evidences an intent to take an appeal.

The Court rejected this argument stating:

> "The record before us does not indicate nor does counsel state that counsel sought to have the district court file the document construe it as a notice of appeal, or enlarge the notice of appeal

period on grounds of excusable neglect pursuant to Rule 4(a) Federal Rules of Appellate Procedure."

The Court then indicated that it lacked jurisdiction to hear the appeal.

REASONS FOR GRANTING THE PETITION

There is a split amongst the Circuit Courts as to when a court may construe a technically deficient notice of appeal as fulfilling the requirements of Rule 4(a). Rule 3(c) of the Federal Rules of Appellate Procedure states as follows:

> "The Notice of Appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal."

The bond on appeal was filed on or about February 2, 1978 with the Federal District Court. Because of the fact that the docket clerk did not consider the appeal bond to be a Notice of Appeal, she did not docket the appeal bond, but rejected it, and requested another copy of the appeal bond to be filed with the Notice of Appeal on February 8, 1978.

The Clerk of the District Court must accept for filing any papers that are delivered to him. It is not his function to pass on the sufficiency or timeliness of the notice. Such questions are to be determined by the Court of Appeals, see *Graves v. General Insurance Co.*, 381 F2d 517, 11 Fr. Serv. 2d 736.14, Case 1 (CA 10th, 1967).

Rule 3(c) requires that the Notice of Appeal (1) specify the parties taking the appeal (2) designate the judgment or part thereof appealed from, and (3) name the Court to which the appeal is taken. The bond, Plaintiff's Exhibit "2", fulfills all those requirements.

With respect to the first requirement, failure of the notice to specify the appellant by name is an arguably harmless error if, in fact, the notice was filed by the Appellant, and there is no possibility of mistakes as to his identity. *Heinz v. Roberts*, 135 Iowa 748, 110 NW 1034 (1907).

Failure of the notice correctly to designate the court to which the appeal is taken does not vitiate it. Misnomer is immaterial, at least if it is obvious to which appellate court the appeal must go. *Cutting v. Bullerdick*, 178 F2d 774 (CA 9th 1949); *Trivette v. New York Life Ins. Co.*, 270 F2d 198, 2 FR Serv 2d 736.14, Case 1 (CA 6th, 1959) ("Federal District Court of Appeals for the Sixth Circuit" designated); *Graves v. General Ins. Co.*, 381 F2d 517, 11 FR Serv 2d 736.14, Case 1 (CA 10th, 1967) ("Supreme Court of the State of New Mexico" designated).

In connection with this discussion of the effects of defects in the notice of appeal, it should be noted that a variety of papers that failed utterly to comply with Rule 3(c) have been recognized as effective as notices of appeal.

Crump v. Hill, 104 F.2d 36, 37-38, 1 FR Serv. 73a.11, Case 1 (CA 5th, 1939), an early decision under former Rule 73(a) of the Federal Rules of Civil Procedure, so ably and succinctly stated the requirements of filing, the reasons behind it, and the spirit in which the

requirement should be interpreted. In pertinent part, the decision was as follows:

> "It is true that Rule 73 does specifically provide that the only thing necessary to be done to perfect an appeal is to file notice thereof with the clerk, making it the duty of the clerk to see that notice thereof is served, and that a literal compliance with the rule requires timely filing of the notice with the clerk. The reason for the rule, however, to set the appeal in motion by mere notice without judicial action, makes it quite clear, we think, that the appellant, when he procurred from appellee and filed, her waiver of notice, her acceptance of designation, and her entry of appearance, just as effectively started his appeal as if he had merely filed the notice of appeal with, and left its service to, the clerk. It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But, it would, we think, be a harking bark to the formalistic rigorism of an earlier and outmoded time, as well as a travesty of justice, to hold that the extremely simple procedure required by the Rule is itself a kind of mumbo jumbo, and that the failure to comply formalistically with it defeats substantial rights."

The decisions generally hold that the requirement is discharged if the party attempting to appeal makes a clear assertion of his determination to do so, addressed either to the district court or to the Court of Appeals, within the time allowed for taking the appeal. Thus, the

filing of a petition for leave to appeal in forma pauperis was held to meet the requirements of filing the notice, even where the petition was filed in the Court of Appeals rather than in the District Court. See *Ruth v. Bird*, 239 F.2d 257, 23 FR. Serv 34.41, Case 4 (CA 5th, 1956); *Hoover v. United States*, 268 F2d 787, 2 FR Serv 2d 73a.53, Case 1 (CA 10th, 1959); *Fitzsimmons v. Yeager*, 391 F2d 840 (CA 3d, 1968) (Application for leave to proceed in forma pauperis or application for certificate of probable cause will be treated as notice of appeal in habeas corpus proceedings); *Gerringer v. United States*, 213 F2d 346 (CA DC 1954). See also, *Frace v. Russell*, (CA, 1965) 341 F2d 901, in which a "Brief for Appeal" filed in the Court of Appeals was held a sufficient notice of appeal); *Carter v. Campbell*, 285 F2d 68, 4 FR Serv 2d 73a.14, Case 1 (CA 5th, 1960) (An application to the Court of Appeals for leave to proceed on the original record and the court's grant of such leave was held to constitute an adequate appeal); *Jordan v. United States District Court*, (CA DC 1956) 233 F2d 362, vacated on other ground (1956) 352 U.S. 904, 77 S. Ct. 151, 1 LEd. 2d 114 (A petition for mandamus filed in the Court of Appeals constituted a notice of appeal.); *Richey v. Wilkins*, 335 F2d 1.8 FR Serv 2d 73.1.14, Case 1 (CA 2d 1964) (Notice of appeal filed in the Court of Appeals rather than in the District Court has been held effective.) Finally, in *O'Neal v. United States*, 272 F2d 412 (CA 5th, 1959) (It was held that an appeal bond filed in the District Court can suffice as a notice of appeal).

CONCLUSION

The decision of the Sixth Circuit in the present case is in conflict with thrust of the general trend, and is directly in conflict with the decision of the 5th Circuit in *Richey*. Therefore, the Court should grant this petition for certiorari in order to hear the appeal and clear up a conflict amongst the decisions of the Circuit Court.

Respectfully submitted,

HAYNES & DONNELLY, P.C.
By: WILLIAM D. HAYNES (P14780)
GERALD D. WAHL (P26511)
Attorneys for Petitioner
William Robert Nolte
2600 Book Building
Detroit, Michigan 48226
(313) 963-4200

Dated: October 19, 1978

APPENDIX A

ORDER

(United States Court of Appeals
For The Sixth Circuit)

(Filed June 7, 1978)

(William Robert Nolte, Plaintiff-Appellant, v. The Budd Company, Defendant-Appellee - No. 78-1126)

BEFORE: PHILLIPS, Chief Judge, PECK and LIVELY, Circuit Judges

Appellee has filed a motion to dismiss the appeal for lack of jurisdiction in that the notice of appeal was filed late. Appellant has filed a brief in opposition claiming the notice was timely.

It appears that the district court's judgment was marked "filed" on December 27, 1977 but was not entered on the district court's docket until January 5, 1978. The date of entry begins the 30-day period in which a notice of appeal is to be filed. The 30-day period expired on February 4, 1978, a Saturday, but, pursuant to Rule 26(a), Federal Rules of Appellate Procedure, Monday, February 6, 1978 became the last day in which to file the notice of appeal.

Appellee claims that the additional 3-day period contemplated by Rule 26(c), FRAP. when an act is conditioned upon service of a paper, applies here.

Clearly this rule is inappropriate since Rule 4, FRAP, sets forth that a notice of appeal is to be filed within a period commencing from ". . . the entry of judgment. . . ." See also, *Cashley v. Ford Motor Co.*, 518 F.2d 749 (5th Cir. 1975).

Counsel for the appellee also argues that a bond on appeal was delivered to the district court within the 30-day period and should be construed as a notice of appeal. The bond was apparently not filed and was returned to counsel because a notice of appeal had not been filed. The record before us does not indicate nor does counsel state that counsel sought to have the district court file the document, construe it as a notice of appeal or enlarge the notice of appeal period on grounds of excusable neglect pursuant to Rule 4(a), Federal Rules of Appellate Procedure.

Upon consideration of the motion and it appearing that the failure to timely file a notice of appeal deprives an appellate court of jurisdiction, *Browder v. Director, Department of Corrections*, — U.S. —, 46 U.S.L.W. 4058 (Jan. 10, 1978), *Lindsey v. Perini*, 409 F.2d 1341 (6th Cir. 1969),

It is ORDERED that the motion be and it hereby is granted and the appeal is dismissed.

ENTERED BY ORDER OF THE COURT

s/ John P. Hehman, Clerk

APPENDIX B

ORDER

(United States Court of Appeals
For The Sixth Circuit)

(Filed July 25, 1978)

(William Robert Nolte, Plaintiff-Appellant, v. The Budd Company, Defendant-Appellee - No. 78-1126)

BEFORE: PHILLIPS, Chief Judge, LIVELY, Circuit Judge, and PECK, Senior Circuit Judge.

Petitioner-appellant's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

s/ John P. Hehman, Clerk of Court

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-681

WILLIAM ROBERT NOLTE, Petitioner,

v.

THE BUDD COMPANY, Respondent.

SUPPLEMENTAL APPENDIX

HAYNES & DONNELLY, P.C.
By: WILLIAM D. HAYNES (P14780)
GERALD D. WAHL (P26511)
Attorneys for Petitioner
William Robert Nolte
2600 Book Building
Detroit, Michigan 48226
(313) 963-4200

GREEN, LACKEY & NUSBAUM
By: MERRITT W. GREEN, II
Attorneys for Petitioner
William Robert Nolte
330 Spitzer Building
Toledo, Ohio 43604
(419) 243-1105

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

WILLIAM ROBERT NOLTE, Petitioner,

v.

THE BUDD COMPANY, Respondent.

SUPPLEMENTAL APPENDIX

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION TO COMPEL DISCOVERY, GRANTING DEFENDANT'S MOTION TO VACATE NOTICE OF TAKING DEPOSITION, AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(William Robert Nolte, Plaintiff v The Budd Company, a foreign corporation, Defendant. Civil Action No. 5-71247.)

At a session of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 27th day of December, A.D. 1977;

Present: THE HONORABLE FRED W. KAESS
United States District Judge

On January 16, 1976, this Court rendered a Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment. Plaintiff appealed the dismissal of the suit, and on May 24, 1977, the United States Court of Appeals for the Sixth Circuit entered an Order vacating the decision granting summary judgment and rendering the matter "for reconsideration after plaintiff has conducted reasonable discovery." *Nolte* v. *Budd*, — F.2d — (6th Cir., 5/24/77). Thereafter, this Court entered an Order reopening discovery.

In an attempt to comply with the Order reopening discovery defendant filed its answers to a set of fourteen outstanding interrogatories. Further, plaintiff

filed, and defendant properly responded to, a second set of interrogatories and request for production of documents. On August 30, 1977, after prior notice had been given, plaintiff deposed James A. Brooks, Vice President of Employee Relations for defendant herein. Discovery in this cause was ordered closed as of November 25, 1977.

The first matter presently before the Court is a motion by plaintiff to compel discovery pursuant to Rule 37, Federal Rules of Civil Procedure. Initially, the Court notes that the request of plaintiff was filed on September 21, 1977, and defendant responded on September 30, 1977, producing certain documents while resisting others on the ground that they were unreasonable and/or irrelevant or immaterial to plaintiff's cause of action. Of the ten requests for production of documents made by plaintiff, defendant has properly responded to all, either by production or by refusal to produce. Specifically, defendant has properly produced documents satisfying requests number 1, 2, 4, 5, 6, 8 and 10. With regard to requests number 3 and 7, defendant submitted the requested documents to the Court for an in-camera inspection to determine if the documents were relevant or material to plaintiff's cause of action. The Court has reviewed these documents in their entirety, and is drawn to the inescapable conclusion that nothing within these documents is either relevant, material or capable of leading to relevant or material matter. Thus, the Court concludes that defendant properly refused to produce these documents to plaintiff. Finally, request number 9 was properly resisted by defendant. In view of defendant's prior answer that plaintiff was *not* a bonus employee, the request for a list of bonus employees of the legal department, including the date and amount of

the bonus, was unreasonable and not a proper subject area capable of producing relevant and/or material information.

The Court is particularly sensitive to the fact that an employee alleging age discrimination is at an inherent disadvantage in gathering hard evidence to support his claim, and that "relevant" discovery has a very broad and far-reaching meaning allowing fishing expeditions in certain cases. However, the Court is satisfied that with regard to all plaintiff's requests, defendant has either properly responded by producing the requested information or resisted production because the information sought has no possible bearing on the subject matter of the suit.

The second matter presented to the Court for decision also involves discovery techniques. On November 16, 1977, plaintiff noticed the taking of the deposition of Gilbert F. Richards, Chairman of the Board of defendant corporation. The noticed date was November 23, 1977, as discovery was to close as of November 25, 1977. Defendant resisted the deposition of Mr. Richards on two grounds, to-wit, untimely notice and dilatory tactics in delaying the matter as the deposition of Mr. Richards would serve no useful purpose.

Vacation of a notice of discovery is generally regarded as unfavorable. However, the Court clearly has power to vacate a notice of deposition, Rules 26(c) (1), Federal Rules of Civil Procedure. In the case at bar, the Court is in agreement with both grounds raised by defendant in opposing the deposition of Mr. Richards. First, all the information made available to plaintiff regarding Mr. Richards was produced over two months prior to the closing date of discovery. Secondly, to request defendant to produce Mr. Richards on such short notice

is, within this Court's opinion, unreasonable notice within the contemplation of Rule 30. However, more importantly, plaintiff proffers no reason to the Court why the deposition of Mr. Richards is required. The Court views the noticing of the deposition as an oppressive and annoying tactic calculated to delay the matter past the closing date of discovery in an attempt to preclude the Court from reconsideration of summary judgment.

The third, and most critical, motion before the Court is defendant's motion for reconsideration of summary judgment. Viewing the affidavits and counteraffidavits submitted by the parties in the light most favorable to plaintiff, together with the depositions, answers to interrogatories and produced documents, the matter at bar is ripe for summary judgment, and the Court therefore reinstates, in full, its January 16, 1976, Opinion and Order granting same. In spite of the additional discovery that has been conducted, plaintiff has failed to show that there is any genuine issue as to a material fact regarding his claim of age discrimination.

In light of the above considerations, IT IS ORDERED that Plaintiff's Motion to Compel Discovery be, and hereby is, denied.

IT IS FURTHER ORDERED that Defendant's Motion to Vacate Notice of Taking Deposition be, and hereby is, granted.

IT IS FURTHER ORDERED that Defendant's Motion for Reconsideration of Summary Judgment be, and hereby is, granted.

/s/ Fred W. Kaess
United States District Judge

CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-681

WILLIAM ROBERT NOLTE,
Petitioner,

v.

THE BUDD COMPANY,
Respondent.

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COLOMBO AND COLOMBO
By: LOUIS J. COLOMBO, JR. (P12085)
LAWRENCE F. RANISZESKI (P23939)
Attorneys for Respondent
The Budd Company
1500 N. Woodward, Suite 209
Birmingham, Michigan 48011
(313) 645-9300

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-681

WILLIAM ROBERT NOLTE,
Petitioner,

v.

THE BUDD COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Budd Company respectfully prays that this Honorable Court deny the Petitioner's request for the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

While the Petitioner has appended to his Petition copies of two (2) of the Orders of the Sixth Circuit Court of Appeals and supplementally appended the Memorandum Opinion and Order Denying Plaintiff's Motion to Compel Discovery, Granting Defendant's Motion to Vacate Notice of Taking Deposition, and Granting Defendant's Motion for Summary Judgment entered by the United States District Court on December 27, 1977, he has failed to append to his Petition as required under U.S. Sup Ct Rule 23(1) (i), 28 U.S.C.A. copies of the Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment entered by the Honorable Fred W. Kaess, United States District Judge on January 16, 1976; the District Court's Judgment of Dismissal entered January 16, 1976; the Order of the Sixth Circuit Court of Appeals dated May 24, 1977 vacating the District Court's Decision and remanding the matter for reconsideration after reasonable discovery had been conducted; the Judgment of the United States District Court Dismissing this action entered on December 27, 1977; the Order filed by the United States Court of Appeals for the Sixth Circuit on June 13, 1978 correcting typographical errors on the Order entered on June 7, 1978; the Memorandum Opinion of the Honorable Fred W. Kaess, United States District Judge dated September 7, 1978 denying Plaintiff's Motion for Extension of Time to File Appeal, denying Defendant's Motion for Attorneys' Fees, and granting Defendant's Motion for Costs and the Order entered consistent with the Court's Memorandum Opinion on September 7, 1978. (The Petitioner took no appeal from that portion of the Order which denied his Motion for Extension of Time to File an Appeal.) Accordingly, the Respondent has appended to its Brief the aforesaid Opinions and Orders (App. A — G, infra, pp. A1 — A16).

COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit abused its discretion in dismissing Petitioner's Appeal for lack of jurisdiction where Petitioner failed to timely file a Notice of Appeal within the time prescribed by F.R.A.P. Rule 4(a), 28 U.S.C.A.?

COUNTER STATEMENT OF RULE TO BE CONSTRUED

Contrary to the assertion of the Petitioner, Respondent maintains that this Honorable Court is being requested to construe the following provisions of the Federal Rules of Appellate Procedure.

Rule 4(a)

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of

appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

* * * *

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

COUNTER STATEMENT OF THE CASE

Since the Petitioner has made misleading and inaccurate statements to this Court, not supported by the record, Respondent is compelled to submit this brief Counter Statement of the Case.

Neither the District Court docket entries nor the Order of the United States Court of Appeals for the Sixth Circuit dated June 7, 1978 support Petitioner's assertion that a Notice of Appeal was mailed to the Court of Appeals and filed with the District Court within the thirty (30) day time period allowed for filing a Notice of Appeal under Rule 4(a) of the Federal Rules

of Appellate Procedure. In fact, a review of the District Court docket entries reveals that Petitioner's Notice of Appeal was docketed on February 8, 1978, after the thirty (30) day time period had elapsed. Furthermore, on Page 2 of his Brief in Opposition to the Motion to Dismiss the Appeal for Lack of Jurisdiction filed in the United States Court of Appeals for the Sixth Circuit, Petitioner admits that he "has no proof" of such alleged filing, since the docket entries for the Federal District Court do not reflect the Notice of Appeal having been filed with the District Court within the required thirty (30) day period. Respondent therefore submits that since the Petitioner has admitted that the docket entries do not indicate that a Notice of Appeal was filed within thirty (30) days, then for purposes of this Petition for Writ of Certiorari, Petitioner's statement that a Notice of Appeal was timely filed within the thirty (30) day period is not only totally inaccurate but misleading.

The same is true with respect to Petitioner's alleged filing of an Appeal Bond with the District Court. Contrary to Petitioner's contention that an Appeal Bond was filed with the District Court, the Sixth Circuit Court of Appeals in its Order dated June 7, 1978 clearly stated that:

> "The record before us *does not indicate nor does counsel state that counsel sought to have the district court file the document*, construe it as a notice of appeal or enlarge the notice of appeal period on grounds of excusable neglect pursuant to Rule 4(a), Federal Rules of Appellate Procedure." (Emphasis Added)

REASONS FOR DENYING THE PETITION

Contrary to the claim made by the Petitioner, the decision of the Sixth Circuit Court of Appeals in the present case is not in conflict with the decision of the Fifth Circuit Court of Appeals in *Richey* v *Wilkins*, 335 F2d 1 (CA 2, 1964) nor with the decision of any other Court of Appeals on the same matter. Since the decision of the Sixth Circuit Court of Appeals is consistent with prior decisions of this Court and other Court of Appeals' decisions, this cause should not be reviewed by this Honorable Court.

It is settled law that the timely filing of a Notice of Appeal is a jurisdictional prerequisite to perfection of such appeal. *Lindsey* v *Perini*, 409 F2d 1341 (CA 6, 1969); *Boggs* v *Dravo Corp*, 532 F2d 897 (CA Pa. 1976); *Lashley* v *Ford Motor Company*, 518 F2d 749 (CA Ga. 1975); *United States* v *Hoye*, 548 F2d 1271 (CA 6, 1977). This Honorable Court recently reaffirmed this principle in *Browder* v *Director, Department of Corrections*, — US —, 54 L Ed 2d 521, 531, 98 S Ct— (1978) when it stated:

> "Under Rule 4(a) of the Federal Rules of Appellate Procedure and 28 USC § 2107 [28 USCS § 2107], a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. This 30-day time limit is 'mandatory and jurisdictional.' United States v Robinson, 361 US 220, 229, 4 L Ed 2d 259, 80 S Ct 282 (1960). See also Fallen v United States, 378 US 139, 12 L Ed 2d 760, 84 S Ct 1689 (1964); Coppedge v United States, 369 US 438, 442, 8 L Ed 2d 21, 82 S Ct 917 (1962); United States v Schaefer Brewing Co., 356 US 227, 2 L Ed 2d 721, 78 S Ct 674, 73 ALR 2d 235 (1958); Matton Steamboat Co.v Murphy, 319 US 412, 415, 87 L Ed 1483, 63 S Ct 1126 (1943); George v Victor Talking Mach. Co., 293 US 377, 379, 79 L Ed 439, 55 S Ct 229 (1934). The purpose of the rule is clear: it is 'to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are free of the appellant's demands. Any other construction of the statute would defeat its purpose.' Matton Steamboat, supra, at 415, 87 L Ed 1483, 63 S Ct 1126."

Pursuant to *Browder*, there is no question that in the instant case the Sixth Circuit Court of Appeals did not abuse its discretion in dismissing this cause for lack of jurisdiction since the Petitioner failed to timely file a Notice of Appeal. The District Court's judgment was docketed on January 5, 1978. Pursuant to F.R.A.P. Rule 4(a), Petitioner was required to file in the District Court a Notice of Appeal within thirty (30) days from that date, or in this case, February 6, 1978. Petitioner's Notice of Appeal was not filed with the District Court until February 8, 1978, after the thirty (30) day period had expired. Therefore, since the thirty (30) day period for taking an appeal is "mandatory and jurisdictional", *Browder*, supra, the Sixth Circuit Court of Appeals did not abuse its discretion in dismissing Petitioner's Appeal for lack of jurisdiction.

After completely misstating the facts concerning his alleged filing of an Appeal Bond, Petitioner cites *Richey* v *Wilkins*, supra, and *O'Neal* v *United States*, 272 F2d 412 (CA 5, 1959) in support of his position that his Appeal

should not have been dismissed by the Sixth Circuit Court of Appeals. Petitioner's reliance on these cases is totally misplaced since both *Richey* and *O'Neal* are totally distinguishable from the case at bar.

Richey involved an appeal taken from a lower court denial of the Plaintiff's Application for Leave to Proceed with his civil rights suit *in forma pauperis*. Contrary to the facts of this case, in *Richey*, the appellant *did file* a Notice of Appeal within the thirty (30) day period, but such notice was mistakenly filed with the Court of Appeals rather than the District Court. Since the appellant in *Richey* did file a Notice of Appeal and further, since the appellant was an indigent lay prison inmate unfamiliar with the procedural requirements regarding appeals from District Courts, the Second Circuit Court of Appeals determined that it would hear and decide appellant's appeal despite his failure to comply with the letter of the Court Rules. However, the Court noted on Page 5 of its Opinion that its decision was consistent with "the liberal view which federal Courts have taken of *papers indigent and incarcerated defendants have filed* purporting to be notices of appeal." (Emphasis Added)

Clearly, *Richey* has no application to the case at bar since the Court records and docket entries indicate that this Petitioner *did not file* a timely Notice of Appeal in any court. Furthermore,unlike the appellant in *Richey*, the Petitioner in the case at bar was represented by experienced counsel who was familiar with the requirements of the Federal Rules of Appellate Procedure.

Likewise, *O'Neal* v *United States*, supra, has no application to the case at bar. In *O'Neal*, the criminal defendant's appeal from his judgment of conviction had been dismissed upon the ground that no Notice of Appeal had been filed with the Court clerk of the District Court within the time prescribed by the Court Rules. The Fifth Circuit Court of Appeals subsequently vacated its judgment of dismissal and reinstated the appellant's appeal when it later determined that the appellant had filed an Appeal Bond with the District Court *within the time required* to file an appeal. That Court held that the recitals of the bond were entirely adequate to be accepted as a Notice of Appeal under the Court Rules and to vest that Court with jurisdiction. *O'Neal* is distinguishable from the present case for the simple reason that the court records and docket entries in this case clearly reveal that the Petitioner *did not file* an Appeal Bond within the thirty (30) day period prescribed by F.R.A.P. Rule 4(a). The docket entries clearly reveal that Petitioner's Appeal Bond was filed in the District Court on February 8, 1978, after the appeal period had run. Accordingly, *O'Neal* does not apply to this case.

In support of its position that the Sixth Circuit Court of Appeals did not abuse its discretion in dismissing Petitioner's Appeal, Respondent would refer this Honorable Court to *United States* v *Temple*, 372 F2d 795 (CA 4, 1966). In that case, the criminal defendant contended that his oral notice of appeal in open court

constituted filing of his Notice of Appeal required to be filed within ten (10) days after entry of judgment. In rejecting that contention, the Court stated at Page 799:

> "Rather, we hold that the case before us does not present a situation in which such notice can be considered adequate. The defendant is an attorney and was represented during the trial by retained counsel. He was free under bond during and after the trial. *Furthermore, he had, with assistance of the same counsel who gave oral notice of appeal in the present case, perfected a prior appeal to this Court in this same cause. If the Rule is to be applied at all, it should be applied in this case. We therefore dismiss the appeal because notice was not timely filed in compliance with Rule 37(a).*" (Emphasis Added)

This sound principle has equal application to the case at bar. Petitioner was represented by experienced counsel who was familiar with the requirements of the Federal Rules of Appellate Procedure. Indeed, as in *Temple*, the Petitioner had, with assistance of the same counsel, perfected a prior appeal to the Sixth Circuit Court of Appeals *in this same cause* (Court of Appeals Docket No. 76-1597). As in *Temple*, if the Rule is to be applied at all, it should be applied in this case. Respondent respectfully urges this Court to affirm the Sixth Circuit Court of Appeals' Dismissal of this Appeal because notice was not timely filed in compliance with the Federal Rules of Appellate Procedure.

Finally, though reference to same has been completely omitted by the Petitioner, Respondent would point out to this Honorable Court that on three (3) separate occasions the Petitioner made requests to the Sixth Circuit Court of Appeals and the United States District Court for the Eastern District of Michigan for an extension of time to file his Appeal on the grounds of excusable neglect. Petitioner's first request was contained in his March 22, 1978 Brief in Opposition to Respondent's Motion to Dismiss the Appeal for Lack of Jurisdiction. His second request was contained in his Petition for Re-Hearing En Banc before the United States Court of Appeals for the Sixth Circuit. On both occasions, the United States Court of Appeals for the Sixth Circuit denied Petitioner's request. Despite those denials, the Petitioner subsequently moved for an extension of time to file his Appeal before the United States District Court for the Eastern District of Michigan. That Court on September 7, 1978 denied Petitioner's Motion and in the course of doing so, pointed out that the United States Court of Appeals for the Sixth Circuit had twice rejected identical requests by the Petitioner (App. G, infra, p. A17). Respondent submits these facts to this Court to clarify the record and advise this Court that the issues presented by the Petitioner have been presented on three (3) separate occasions before the lower courts and have been thrice denied.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals in the present case is consistent with similar decisions of other Courts of Appeals on the same matter and with this Court's recent decision in *Browder*. Therefore, since the Sixth Circuit Court of Appeals did not abuse its discretion in dismissing Petitioner's appeal for lack of jurisdiction, this Honorable Court should deny this Petition for Writ of Certiorari.

Respectfully Submitted,

COLOMBO AND COLOMBO
By: LOUIS J. COLOMBO, JR. (P12085)
LAWRENCE F. RANISZESKI (P23939)
Attorneys for Respondent
The Budd Company
1500 N. Woodward, Suite 209
Birmingham, Michigan 48011
(313) 645-9300

Dated: November 14, 1978

APPENDIX A

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

Dated: January 16, 1976

(William Robert Nolte, Plaintiff v. The Budd Company, Defendant — No. 5-71247)

BEFORE: THE HONORABLE FRED W. KAESS
United States District Judge

Defendant seeks dismissal, or in the alternative, summary judgment of plaintiff's complaint, pursuant to Rules 12(b) (6) and 56 of the Federal Rules of Civil Procedure. Plaintiff's complaint seeks declaratory, injunctive, and equitable relief based on an alleged improper discharge in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq.

A brief review of the facts is necessary to an understanding of the issues present here. In December, 1974, the plaintiff had been employed by the defendant in excess of ten years as a registered patent agent under the title, "Office Manager and Foreign Liaison Coordinator." The plaintiff was not an attorney. Previously, in 1972, a corporate decision had been made to reorganize the defendant company. This decision included the creation of a Legal Department, which

would include the former Patent Department, and a moving of the General Offices of the company from Philadelphia, Pennsylvania to Troy, Michigan. An offer of relocation and employment was made to, and accepted by, the plaintiff. Not all employees were offered the option of employment and relocation.

During December, 1974, Mr. Thomas I. Davenport, Corporate Counsel for the defendant, was advised that due to the current industry-wide depressed economic situation, immediate reductions in optional activities and operating expenses would be necessary. On evaluation, it was determined that the position held by the plaintiff was not an essential one, and would, therefore, be eliminated. On December 13, 1974, the plaintiff was advised that he would be placed on a furlough status effective January 20, 1975. Plaintiff was 56 years old at this time.

Plaintiff asserts, by affidavit, that when advised of the elimination of his position, he was told that "he had reached a plateau" with the defendant company. He has also submitted a roster of corporate management personnel which includes the respective ages of those employees. It is further contended that the functions previously performed by the plaintiff are now being performed by a younger attorney on the legal staff.

In response, defendant contends that the elimination of the position of the plaintiff was dictated by purely economic reasons. Defendant denies that any statements about a "plateau" were made to the plaintiff. It is also submitted that the roster was prepared in 1971 in anticipation of a move to Detroit, for the purpose of determining those employees who might be near retirement and, therefore, not interested in relocation.

Finally, defendant points out that the person who assumed a portion of the former duties of the plaintiff was an attorney who had been with the defendant for ten years, who is only slightly more than one year younger than the plaintiff,[1] and who has been consistently more highly rated in his job performance.

Section 4(a) (1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1) provides as follows

> It shall be unlawful for an employer —
>
> > to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

As with any restriction of this type, legitimate exceptions to the general rule are recognized. Section 4(f) (1) of the Act, 29 U.S.C. § 623(f) (1) provides

> It shall not be unlawful for an employer, employment agency, or labor organization —
>
> > to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

---

[1] It is not disputed that a part of plaintiff's former duties are being performed by an outside data processing company.

The purpose of the Act is to promote the employment of older persons in the general economy, and to prevent the exercise of arbitrary and discriminatory practices on that class. *Hodgson* v. *First Federal Savings & Loan Association of Broward County, Fla.*, 455 F.2d 818 (5th Cir. 1972); *Brennan* v. *Reynolds & Co.*, 367 F. Supp. 440 (N.D. Ill. 1973).

In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the Court set forth the requirements "of establishing a *prima facie* case of racial discrimination" under Title VII of the Civil Rights Act of 1964, 78 Stat. 253. The Court noted that

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (Footnote omitted).

McDonnell, supra, at 802. The case presently before the Court is not an action under Title VII. However, both the language and intent of Title VII bear a great deal of similarity to that found in the Age Discrimination Act. *See, Laugesen* v. *Anaconda Company*, 510 F.2d 307, 312 (6th Cir. 1975); *Wilson* v. *Sealtest Foods Division of Kraftco Corp.*, 501 F.2d 84, 86 (5th Cir. 1974). The analogy between the two, while not perfect, does suggest comparison. *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 94 (8th Cir. 1975), is distinguishable from the case at bar in that it involved a discriminatory refusal to

hire, and not a discharge. In *Potter* v. *Goodwill Industries of Cleveland*, — F.2d — (6th Cir., July 18, 1975), the Court noted that

> . . . in order to make out a prima facie case of discriminatory discharge, a Title VII plaintiff must show only that he is a member of a class entitled to the protection of the Civil Rights Act, that he was discharged without valid cause, and that the employer continued to solicit applications for the vacant position.

Considering the factors set forth in both *McDonnell* and *Potter*, it seems fair to say that the initial burden on the plaintiff, in a case of age discrimination, would require a showing that he is a member of the class entitled to the protection of the Act,[1] that he was discharged without valid cause, and that he was replaced by a younger person. Cf., *Wilson, supra*, at 86.

In this respect, the Court sees two defects in the case of the plaintiff. First, the affidavits submitted by the defendant establish without dispute that the elimination of the position held by the plaintiff and his subsequent placement on furlough status were the result of corporate decisions to reduce the work force. This decision resulted in a reduction in the general work force from 20,877 to 15,234 employees and a reduction in the company's Legal Department work force from eight to six persons (Davenport Affidavit, p. 6).

---

[1] Ages 40-65. 29 U.S.C. § 631.

Secondly, while the person who replaced the plaintiff is admittedly slightly younger, this does not necessarily give rise to the presumption that age discrimination was utilized in discharging the older employee.[1] Also,

---

[1] As stated by the Court in Laugesen v. Anaconda Company, 510 F.2d 307 (6th Cir. 1975), at 313, n. 4

> It is also evident from the Report, that Congress did not desire that the Act be applied formalistically:
>
> > 'The case by case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions.'
>
> The foregoing language suggests that perhaps the more strict approach which is evident in the treatment of a Title VII race discrimination case in McDonnell Douglas v. Green may not be desirable here. The progression of age is a universal human process. In the very nature of the problem, it is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in. This factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex and national origin. Thus, while the principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age, *we do not believe that Congress intended automatic presumptions* to apply *whenever a worker is replaced by another of a different age.*

(Emphasis added).

as indicated previously, the replacement had consistently been more highly rated in job performance, had been with the company an approximately equal amount of time, and was an attorney (Davenport Affidavit, p. 5). Plaintiff points out that, as a registered patent agent, he was able to practice before the United States Patent Office in the same manner as an attorney. This, however, ignores the fact that an attorney is able to perform many tasks and functions which are outside the scope of a registered patent agent.

The Court recognizes that summary judgment in any case must be approached with a great deal of caution. *Tee-Pak* v. *St. Regis Paper Co.*, 491 F.2d 1193, 1196 (6th Cir. 1974); *S. J. Grove & Sons* v. *Ohio Turnpike Commission*, 315 F.2d 235 (6th Cir. 1963). Yet where there is no genuine issue of material fact, such a remedy is appropriate. *Brennan* v *Reynolds & Co.*, 367 F.Supp. 440, 442 (N.D. Ill. 1973).

For the reasons set forth above, IT IS ORDERED that Defendant's Motion for Summary Judgment be, and hereby is, granted.

/s/ Fred W. Kaess
United States District Judge

APPENDIX B

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

Dated: January 16, 1976

(William Robert Nolte, Plaintiff, v. The Budd Company, Defendant — No. 5-71247)

BEFORE: THE HONORABLE FRED W. KAESS
United States District Judge

Defendant's Motion for Dismissal or, In the Alternative, for Summary Judgment, having been duly considered, and a decision having been rendered in a Memorandum Opinion and Order of even date herewith;

IT IS ORDERED and ADJUDGED that the case be dismissed.

/s/ Fred W. Kaess
United States District Judge

APPENDIX C

ORDER

(United States Court of Appeals
For the Sixth Circuit)

Dated: May 24, 1977

(William Robert Nolte, Plaintiff-Appellant, v. The Budd Company, Defendant-Appellee — No. 76-1597)

BEFORE: CELEBREZZE and LIVELY, Circuit Judges; and RUBIN* District Judge

Plaintiff William Robert Nolte appeals from summary judgment granted to defendant The Budd Company in an action wherein he asserted violation of the Age Discrimination in Employment Act (29 U.S.C. § 621, et seq). Defendant responded to plaintiff's complaint by the filing of a motion to dismiss or in the alternative for summary judgment supported by affidavit. A counter affidavit was filed by the plaintiff and during the

---

* The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

pendency of the motion, plaintiff filed interrogatories and notices of an intention to take depositions. The defendant refused to submit to discovery during the pendency of his motion and plaintiff's motion to compel discovery was not ruled upon.

While no opinion is expressed as to the merits of plaintiff's case, he should be given an opportunity to conduct reasonable discovery in support of his claims. As this Court noted in *Senter* v. *General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), proof of overt discrimination is seldom direct. In acknowledging the value of statistical evidence in establishing a prima facie case of discrimination we stated:

> An employee is at an inerent disadvantage in gathering hard evidence of employment discrimination, particularly where the discrimination is plant-wide in scope.

532 F.2d at 527.

These considerations are equally applicable to the need for discovery prior to disposition of an employee's claims by summary judgment.

The decision of the District Court in granting summary judgment is hereby VACATED and this matter is hereby REMANDED for reconsideration after plaintiff has conducted reasonable discovery.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

APPENDIX D

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

Dated: December 27, 1977

(William Robert Nolte, Plaintiff, v. The Budd Company, Defendant — No. 5-71247)

BEFORE: THE HONORABLE FRED W. KAESS
United States District Judge

Defendant's Motion for Reconsideration of Summary Judgment having been duly considered, and a decision having been rendered in a Memorandum Opinion and Order of even date herewith;

IT IS ORDERED and ADJUDGED that the case be dismissed.

/s/ Fred W. Kaess
United States District Judge

APPENDIX E

ORDER

(United States Court of Appeals
For the Sixth Circuit)

Dated: June 13, 1978

(William Robert Nolte, Plaintiff-Appellant v. The Budd Company, Defendant-Appellee — No. 78-1126)

The following typographical errors on the order entered herein on June 7, 1978 are corrected as follows: the first word of paragraph three is corrected to read "Appellant." The fourth word of paragraph four is corrected to read "appellant."

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

APPENDIX F

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

Dated: September 7, 1978

(William Robert Nolte, Plaintiff, v. The Budd Company, Defendant — No. 75-71247)

BEFORE: THE HONORABLE FRED W. KAESS
United States District Judge

Plaintiff comes before this Court on a motion for extension of time to file an appeal on the basis of undue hardship. Defendant answers and requests that attorneys' fees and costs be taxed against plaintiff and his attorneys in an amount of no less than $15,000.00 on the grounds that this lawsuit is groundless, meritless, and vexatious.

This Court has no authority to grant plaintiff's motion for extension of time to file an appeal. The United States Court of Appeals for the Sixth Circuit has twice rejected identical requests by the plaintiff. *See, Reynolds Spring Co.* v. *L. A. Young Industries, Inc.*, 101 F.2d 257 (6th Cir. 1939). Moreover, the period of time permitted by Rule 4(a) of the Federal Rules of Appellate Procedure for an extension of time upon a showing of excusable neglect has long since expired.

In support of its petition for attorneys' fees, defendant has cited three Title VII employment discrimination cases in which successful defendants were awarded attorneys' fees. The instant employment discrimination case, however, was brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq. The provisions which grant authority for awards of attorneys' fees in Title VII and in the Age Discrimination in Employment Act of 1967 contain dissimilar language. 42 U.S.C. § 2000e-5(k) allows an award of attorneys' fees to the prevailing party in a Title VII action. *See, Christianburg Garment Co.* v *EEOC*, 434 U.S. 412 (1978). 29 U.S.C. § 216(b), which is incorporated by the enforcement provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b), states that the district court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorneys' fee to be paid by the defendant, and the costs of the action." *See, Monroe* v. *Penn-Dixie Cement Corp.*, 335 F. Supp. 231 (N.D.Ga. 1971); *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974). Hence, while agreeing with defendant that plaintiff's claim is frivolous, unreasonable, and without foundation, the Court finds that, unlike Title VII cases, it has no authority to award attorneys' fees to a successful defendant in a case brought under the Age Discrimination in Employment Act of 1967.

Unlike awards of attorneys' fees, which must generally have statutory authority, the taxation of costs is normally within the sound discretion of the district court. F.R.Civ.P. 54(d). Although 29 U.S.C. § 216(b) does speak to the subject of costs, this provision only takes the matter outside the district court's discretion when a plaintiff is successful. *See, Hayes* v *Bill Haley and his Comets, Inc.*, 274 F.Supp. 34 (E.D.Pa. 1967). Thus, the Court finds that the taxation of costs is within its discretion in cases brought under the Age Discrimination in Employment Act of 1967 when a defendant is successful. Therefore, this Court awards the ordinary costs of this litigation, in the amount of $387.91, to the defendant.

An appropriate Order shall issue.

/s/ Fred W. Kaess
United States District Judge

Dated: September 7, 1978
Detroit, Michigan

APPENDIX G

ORDER DENYING PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO FILE APPEAL, DENYING DEFENDANT'S MOTION FOR ATTORNEYS' FEES, AND GRANTING DEFENDANT'S MOTION FOR COSTS

(United States District Court
Eastern District of Michigan
Southern Division)

Dated: September 7, 1978

(William Robert Nolte, Plaintiff, v. The Budd Company, Defendant — No. 75-71247)

BEFORE: THE HONORABLE FRED W. KAESS
United States District Judge

Plaintiff's Motion for Extension of Time to File an Appeal, and Defendant's Motion for Attorneys' Fees and Costs having been duly considered by the Court and a decision having been rendered in a Memorandum Opinion of even date herewith;

IT IS ORDERED that Plaintiff's Motion for Extension of Time to File an Appeal be, and hereby is, denied.

IT IS FURTHER ORDERED that Defendant's Motion for Attorneys' Fees be, and hereby is, denied.

IT IS FURTHER ORDERED that Defendant's Motion for Costs be, and hereby is, granted, as follows:

This Court hereby awards the ordinary costs of this litigation in the amount of Three Hundred Eighty-Seven and 91/100 ($387.91) Dollars to the defendant.

/s/ Fred W. Kaess
United States District Judge